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September 16, 2011

VIA ECFS AND E-MAIL

Ms. Sharon E. Gillett
Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Kristin Brooks Hope Center
WC Docket 07-271, CC Docket 95-155

Dear Ms. Gillett:

In December 2010, the U.S. Court of Appeals for the D.C. Circuit remanded the Commission's decision in the *800 SUICIDE Reassignment Order*[1] for failure to provide a reasoned explanation of the Commission's decision.[2] The record in the remand proceeding demonstrates that the "extraordinary, emergency situation" asserted to have applied in 2007 does not exist in 2011. Indeed, even SAMHSA no longer contends that an emergency situation exists, and it has made no showing whatsoever challenging KBHC's demonstration that it has more than enough financial stability to re-assume control of the toll-free numbers at issue in this proceeding. Nevertheless, it recently has been suggested that the Commission can re-assign the toll-free numbers based on an entirely new premise, one that imposes a higher duty on subscribers of numbers affecting public safety than applies to subscribers of "ordinary" toll-free numbers. Under this new theory, the Commission would evaluate whether KBHC possessed the

1 *U.S. Department of Health & Human Services Substance Abuse and Mental Health Services Administration's Petition for the Permanent Reassignment of Three Toll-Free Suicide Prevention Numbers*, Memorandum Opinion and Order and Order on Review, 24 FCC Rcd 13022 (2009) ("800-SUICIDE Reassignment Order").

2 *Kristin Brooks Hope Center v. FCC*, 626 F.3d 586 (D.C. Cir. 2010).

as-yet undefined qualities necessary to be a subscriber to such a number and, if it determined that KBHC did not possess these qualities, the Commission would assign the numbers to SAMHSA.

This new theory is itself unlawful and unworkable for a number of reasons. As explained below, if the Commission were to follow this theory, it would once again have acted in an arbitrary and capricious manner and would open itself to a second reversal from the Court of Appeals.

First and most importantly, the FCC may not now create a two-tiered eligibility standard for toll-free subscribers. The FCC follows a "first-come, first-served" policy for toll-free number assignment. The first-come, first-served policy does not distinguish among the potential uses for a toll-free number. All subscribers are judged based on the same criterion – namely, which subscriber requests a number first. There is nothing in the existing rules that imposes higher eligibility criteria on potential subscribers that intend to use the numbers for a "public safety" purpose.

It is hornbook law that the Administrative Procedures Act permits agencies to create substantive rules only through notice and comment rulemaking procedures.[3] As the *Sprint* court explained, "new rules that work substantive changes in prior regulations are subject to the APA's procedures."[4] Clearly, to impose a minimum eligibility standard on certain toll-free subscribers would effect a substantive change to the Commission's allocation rules. No such eligibility rule is in place now. In fact, the Commission explicitly *eschewed* reliance on the characteristics of the subscriber seeking assignment when it adopted its "first-come, first-served" rule.[5] It cannot now *create* such a standard for assignment of toll-free numbers without first employing notice and comment rulemaking.

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3 5 U.S.C. § 553(b), (c); *see Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

4 *Sprint*, 315 F.3d at 373; *see also, Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) (notice and comment procedures required when FCC action "changed the substantive criteria" applicable to petitioner's proposal).

5 *Toll Free Service Access Codes*, Fourth Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 9058, 9066-68 (1998) (rejecting allocation based upon industry classification codes due to administrative burdens and difficulty of enforcement; rejecting allocation based upon lotteries because of the danger of "brokering and manipulation of the system to bypass eligibility requirements"; rejecting a right of first refusal because of the administrative burden to devise a method to assign priority among multiple eligible entities). The primary benefit of first-come, first-served allocation was that it "would avoid the need to resolve competing claims among subscribers to assignment of particular numbers." *Id.* at 9068.

Neither of the exceptions to notice and comment procedures apply in this instance. The APA's exception for an agency's procedural rules "is to be construed very narrowly, and it does not apply where the agency 'encodes a substantive value judgment.'"[6] Such a new substantive standard for toll-free subscribers is not a procedural rule. Further, the rule cannot be a clarification of rule 52.111. A clarification interprets an existing rule, whereas a new rule establishes substantive changes in the prior rule.[7] When an agency "changes the rules of the game" such that a party "must assume additional obligations," then the agency has enacted a new rule, not a clarification.[8] Any new eligibility criteria for "public safety" numbers would enact just such a new rule in this instance. If KBHC suddenly were required to demonstrate a minimum qualification before return of the toll-free numbers to it, this burden would "change the rules of the game" and require KBHC to "assume additional obligations" in order to obtain the toll-free numbers originally assigned to it beginning in 1998.

Accordingly, if the Commission were to impose a higher duty on subscribers to certain toll-free numbers, its actions would be unlawful. The Commission cannot impose such a requirement without first employing notice and comment procedures under the APA (and even then, it could only apply the rules prospectively to new number assignments).

Second, such a rule would be extremely burdensome to apply and result in arbitrary and capricious decision-making. The proposed approach would necessarily require the Commission to assess the uses to which a requesting subscriber would put any toll-free number. Such an approach would not only require an FCC investigation into the proposed use for a toll-free number when the initial request was made for assignment of a number, but it would also require ongoing monitoring of toll-free numbers to determine if "public safety" or "public resource" numbers were still being utilized for that purpose and whether the subscriber continued to meet the criteria for operating such a number. This would exponentially complicate the process for the FCC in assigning toll-free numbers and, in the absence of clear and definitive guidelines instructing such assessment, the FCC's assignment decisions would be arbitrary and capricious.

Because the purpose to which the requesting subscriber would put the number would determine whether the number is assigned on the first-come, first-served basis designated by the regulations or the subjective evaluation process used for "public safety" numbers, all requests for a toll-free number would have to be accompanied by an explanation of the use to which the requester plans to put the number. The FCC would then have to determine whether

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6 *Reeder v. FCC*, 865 F.2d at 1305 (quoting *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)).

7 *Sprint*, 315 F.3d at 374.

8 *Id.*

this use constitutes a "public safety" use.[9] If the FCC makes such a determination, then the requester would have to submit additional evidence demonstrating that it meets the criteria for administering a "public safety" toll-free number.[10] The FCC would then make its determination regarding assignment based on its evaluation of the submitted evidence.

After assignment, the FCC would have to continue monitoring any "public safety" number subscriber to ensure that it continues to meet the criteria for administering this type of special toll-free number and to evaluate the uses to which the number is being put on a going forward basis.[11] If, for example, the subscriber stopped using the number as a public safety number, then it would no longer be subjected to the heightened standard applicable to public safety numbers and would not need to demonstrate that it meets the minimum competency standards. Such an example is particularly instructive here. In 2007, the FCC denied SAMHSA's request for one of KBHC's toll-free numbers because it was "no longer" being promoted as a suicide prevention hotline. Thus, it appears that if a number ceases to be used as a

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9 Which would, in addition to other issues, raise the question of whether a number can be designated as a "public safety" number prior to its use as one. While the purpose of a number may tend towards a public safety goal, the question exists of whether a number that is under-utilized such that it in practice does nothing or little to promote public safety, would be a public safety number subject to the higher standards. Based on the FCC's assessment of KBHC's toll-free numbers, the answer to this appears to be "no" since it was the high usage of the number and the loss of access to counseling that all those potential callers would face in the event of a cut-off of service that presented the "emergency" circumstances upon which the FCC's reassignment of the numbers was premised. *See U.S. Department of Health & Human Services Substance Abuse and Mental Health Services Administration's Petition for the Permanent Reassignment of Three Toll-Free Suicide Prevention Numbers*, Memorandum Opinion and Order and Order on Review, 22 FCC Rcd. 651, ¶ 10 (2007) ("800-SUICIDE Temporary Reassignment Order").

10 Presumably part of the FCC's investigation would have to include whether the number was going to be used solely for a public safety purpose or whether it would be used for multiple purposes and whether those other uses either disqualified it as a public safety number or those multiple uses were prohibited because one of the uses was a public safety one.

11 Based on the 2007 FCC decision regarding KBHC's toll-free numbers, the uses to which the number is put will both determine the initial assignment and the continued assignment. The basis upon which the FCC denied the SAMHSA's request with respect to two of the numbers requested in its original petition was because the numbers were not being promoted as suicide hotlines. One of the numbers had previously been promoted as a suicide prevention hotline but was not anymore at the time of the order. *See* 800-SUICIDE Temporary Reassignment Order at ¶ 10.

public safety number, the requirements associated with the assignment of such a number would cease to apply.

Thus, administration of any kind of two-tier system based on the existence of a "public safety" number would create an enormous burden for the FCC and ultimately be both unworkable and unlawful.

Third, even if such obstacles could be overcome, the suggested standard does not get the FCC out of the comparative hearing business. If the FCC were to adopt a two-tier system and abandon its rule of first-come, first-served, it cannot make subjective determinations regarding the assignment of toll-free numbers between competing applications for a "public safety" toll-free number without holding a hearing as to the qualifications of the competing parties. As the D.C. Circuit cautioned in its order directing the remand, the Commission's justifications for favoring SAMHSA over KBHC must be adequately explained.[12] The Commission could not apply the new-found higher standard to KBHC without also applying the same standard to SAMHSA.[13] Thus, here, the FCC could not assign the number to SAMHSA based on an assessment of comparative capabilities without first holding an evidentiary hearing.

In analogous circumstances, the Supreme Court has required the FCC to hold a full comparative evidentiary hearing before assigning licenses to one party over another based on subjective criteria rather than a strict first-come, first-served policy.[14] In that decision, the Supreme Court established the *Ashbacker* doctrine and held that in an instance in which the grant of a license between competing mutually exclusive applications is based on the subjective criteria of the public interest, convenience or necessity, the FCC ***must*** hold a meaningful hearing on the merits of those applications.[15] While the Supreme Court in *Ashbacker* was addressing the application of a different provision in the Communications Act, the principle is and should be equally applicable to an identical factual situation such as the one here: where two competing

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12 *Kristin Brooks Hope Center*, 626 F.3d at 589-91. *See id.* at 590 ("the FCC did not explain why the Center's two years of funding was not acceptable, while SAMHSA's barely longer term was") and 591 ("the FCC made no effort to compare the quality of Micktel's offerings with those available to SAMHSA").

13 There is the additional issue raised here where the party requesting assignment of the number would not be the administrator of the number. In such a circumstance, the FCC must determine if both the requesting subscriber and the administrator met the minimum competency requirements for assignment of a public safety number. This would also complicate the process for addressing future events, such as if the subscriber changed the administrator of the number, as this would presumably require a new assessment by the FCC of whether the proposed administrator meets the competency requirements.

14 *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

15 *Id.* at 151.

mutually exclusive requests for a license for right of use (here a phone number; in *Ashbacker* a broadcast frequency) exist and the agency is making a decision based on the subjective determination of the public interest, it is required to hold a comparative evidentiary hearing regarding the two applications.[16]

Because the FCC is clearly evaluating two mutually exclusive applications for the grant of a license or right of use, the *Ashbacker* doctrine requires the FCC to hold a comparative evidentiary hearing evaluating all of the relevant facts and making an assessment as to whether the parties meet the competency criteria that the FCC establishes for the allocation of public safety hotlines. Any such hearing would have to involve a full presentation of the facts, including the operations and involvement of SAMHSA's designee who operates the hotlines and the prevalence of outages on the numbers since the temporary reassignment. The Commission also would be obligated to receive evidence of KBHC's operations, both historically and currently, and its ability to meet the minimum competency standards that would apply to "public safety" numbers. None of that information is in the record today.

Undertaking a comparative hearing here would be no light task. Such comparisons are not easy to make. The Commission repeatedly has noted the difficulties of such comparative hearings:

> - "Comparative hearings were often time consuming and resource intensive from the perspective of both the applicants and the Commission. . . . The task of evaluating and then awarding the licenses in an informed and equitable manner put a strain on Commission resources. In addition to the cost of evaluating licensees, the opportunity costs caused by delays using this method were high."[17]
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> - "The adjudicatory framework used to make this comparative selection can be described most charitably as

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16 *See e.g. Kodiak Airways Inc. v. Civil Aeronautics Brd.*, 447 F.2d 341 (D.C. Cir. 1971) (applying the *Ashbacker* doctrine and the "spirit" of *Ashbacker* outside the context of the FCC statute at issue in *Ashbacker* and in the broader context of a federal agency evaluating competing and mutually exclusive applications).

17 *FCC Report to Congress on Spectrum Auctions*, 13 FCC Rcd 9601, 9608-09 (1997).

> laborious, exceedingly time consuming, expensive and often results in choices based on, at most, marginal differences."[18]

Fourth, the Commission lacks the evidentiary record to avoid an unlawful delegation of its authority in this case. As the record here makes clear, SAMHSA does not operate the suicide hotlines. Instead, it contracts that responsibility out to a third party through a contract bidding process that SAMHSA administers. In any situation in which SAMHSA and not the FCC selects the actual toll-free operator, the FCC is delegating to SAMHSA the responsibility to make the substantive determination as to whether the operator of the hotlines satisfies the FCC's criteria for "public safety" numbers. Such a delegation is clearly illegal. When a federal agency has been delegated authority, unless it is delegating to a subordinate agency, it cannot delegate that authority to a third party absent express congressional authorization, even if the third party is another federal agency.[19] And yet, this is exactly what the adoption of a special and higher public safety standard would do.

Each time SAMHSA solicits bids and awards a contract for the hotlines would involve an unlawful delegation. As the record makes clear, the contract with the current administrator of the hotlines expires in September 2012 and, at that time, SAMHSA will be evaluating new bidders and their proposals to administer the hotline. Unless the FCC implements procedures to revisit its assignment a year from now, SAMHSA necessarily will be making the substantive determination as to whether the bidder meets the FCC's new requirements for administering a public safety hotline. As a result, any assignment to SAMHSA to make the determination with respect to hotline operation is an undeniable and unlawful delegation of the FCC's authority to a third party.

* * *

This unlawful tangent should be abandoned. Instead, the best way to resolve this petition is straight-forward. As KBHC explained in its comments on the remand, any entity asking the Commission to depart from its first-come, first-served policy must be held to a high standard to justify such an action.[20] In the Petition for Permanent Reassignment now before the Commission, SAMHSA claimed that KBHC was financially unstable and that the hotlines were at risk of imminent disconnection when under KBHC's control.[21] SAMHSA further claimed

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18 *Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM. and Television Stations By Random Selection*, Notice of Proposed Rulemaking, 4 FCC Rcd 2256, 2257 (1989).

19 *U.S. Telecom. Assoc. v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004).

20 KBHC Remand Comments at 8.

21 Nov. 20, 2007 Petition at 9-10.

that permanent reassignment was necessary because "[p]rior to the Commission's intervention, public access to the suicide prevention hotlines, and therefore, public safety, was jeopardized."[22] In April 2009, SAMHSA reiterated that "HHS initiated a request to the Federal Communications Commission (FCC) in 2006 to reassign three toll-free numbers used as suicide prevention hotlines to SAMHSA *in order to avert a public health emergency"* and that "reassigning the suicide prevention hotlines to KBHC poses grave risks to the sustainability of the numbers due to KBHC's demonstrated inability to operate the numbers in a safe and stable manner that ensures public access."[23] In its most recent filings, however, SAMHSA has abandoned that tact and is now simply arguing that it can provide better quality services.[24] This is an entirely new ground for relief and, since SAMHSA has abandoned its original claim that it is entitled to permanent reassignment because of an emergency and risk of imminent shutdown of the numbers, the factual premise of the pending petition is lacking. Whatever the merits of reassignment might have been in the alleged emergency circumstances cited in the Petition, the petitioner no longer

22 *Id.* at 11.

23 April 22, 2009, Letter to Acting Chairman Copps at 1, 5 (emphasis added); *see also e.g.*, June 25, 2008 Letter to Chairman Martin at 2 (acknowledging that a settlement with AT&T helped its financial stability but claiming that "it does not change the conditions which contributed to the risks to the public of having service to the suicide prevention hotlines shut down or interrupted."); Feb. 28, 2011, SAMHSA Comments on Remand at 7 ("there is no evidence supporting KBHC's assertions of improvement in its financial stability"); *see also* March 7, 2011 SAMHSA Reply Comments at 3, 6 (continuing to argue that reassignment was necessary because there is a "need to assure public access to a reliable and stable resource to serve callers in crisis" and asserting that "[t]he record of this docket has numerous concrete examples of unpaid costs incurred by KBHC, and examples of how these unpaid costs caused disruptions and threats to services."); *id.* at 9 ("The record reflects that KBHC has not been able to" "financially support the numbers without reliance on federal assistance."); *id.* at 11 (reassignment is necessary because of "the demonstrated lack of reliability of the entity that had operated the lines previously.")

24 June 7, 2011 SAMHSA Supplemental Comments.

contends that those conditions still apply. Therefore, the Commission should dismiss SAMHSA's request for permanent assignment as moot.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Steven A. Augustino

cc: Chairman Julius Genachowski
Austin Schlick, General Counsel